

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

In re:)	
)	Case No. 00-14428
GARY ALLEN SKAGGS,)	Chapter 7
)	
Debtor,)	
_____)	
SHEILA SKAGGS,)	
)	
Plaintiff,)	
)	
v.)	Adversary No. 01-5022
)	
GARY ALLEN SKAGGS,)	
)	
Defendant.)	
_____)	

MEMORANDUM AND ORDER

This matter is before the Court on Plaintiff's Petition to Determine Dischargeability of Debt (Doc.

1). Both parties have submitted briefs, and the Court conducted an evidentiary hearing. After reviewing the briefs and considering the evidence presented at the hearing, the Court is prepared to rule.

The Court has jurisdiction to hear this matter as it is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I).

I. FINDINGS OF FACT

Plaintiff and Defendant, the Debtor herein, were divorced on September 23, 1999. Under the Journal Entry and Decree of Divorce ("Divorce Decree"), Defendant was required to pay, *inter alia*, one-half of the back taxes in the amount of \$1,083.51, one-half of the medical expenses incurred during the marriage, approximately \$5,000 to Boeing Credit Union for his vehicle, approximately \$1,500 to Fingerhut

Mastercard, an approximate \$300 credit card bill to Boeing Credit Union, a \$1,600 Fingerhut catalog bill, one-half of the debt owed to Eastside Homes in the approximate total amount of \$5,275.00, and one-half of the debt owed to Commercial Credit in the approximate amount of \$10,000.00. The Commercial Credit debt is secured by the home where Plaintiff resides, along with her three children. The Divorce Decree provided that Defendant was required to “hold [Plaintiff] harmless” on the above listed debts. In addition, the Divorce Decree specifically stated that the debt to Commercial Credit “cannot be discharged in bankruptcy by [Defendant] as to [Plaintiff].”

Both parties contend they do not have the financial resources to pay the debt that Defendant became obligated to pay under the Divorce Decree. Plaintiff has been unemployed since December 2002. She quit her job at that time because she was missing a large amount of work to handle family obligations, including caring for her children, and her absences were problematic for the company. She currently has three children living in her home, one of which is Defendant’s four year old biological child.

Plaintiff’s sole source of income to support herself and her three children is \$200 per month she receives from the Defendant for child support and \$980 per month she receives from Social Security. The Social Security payment is received on behalf of her fourteen-year-old daughter, whose biological father passed away. Plaintiff will no longer receive this \$980 monthly payment once her daughter becomes eighteen years old, in just four years, unless she attends college. In that instance, this child will need the money for college expenses. Plaintiff has attempted to obtain odd jobs, such as mowing lawns during the summer when her older daughter can assist with child care, but this endeavor provides little regular, or predictable, income.

At the time of the evidentiary hearing, Plaintiff was two months delinquent on payments for the first mortgage on her mobile home debt, and one and one-half months delinquent on the second mortgage on that property. Plaintiff was also carrying approximately \$1,000 in credit card debt. Plaintiff has obtained her General Education Diploma (G.E.D.) and took a course to obtain computer skills, but has no other education. Plaintiff's only job skills are the woodworking skills she obtained at her last job.

Defendant similarly contends that he cannot afford to repay the debts he agreed to pay, and was ordered to pay, in the state court divorce proceeding. At the time of the hearing, Defendant had been unemployed since August 2002, when he was fired from Great Plains Industries. He testified he had applied for numerous jobs in the Wichita, Kansas area since that time. He had just moved to Illinois to live with his father at the time of the hearing, and thus has very few living expenses. Defendant's only source of income since September 2002 had been his unemployment compensation, which had recently run out, but he had applied for work in Illinois and was awaiting word. Defendant has numerous job skills, including woodworking skills that allowed him to make doors and windows. In addition, Defendant testified he can do "anything in a factory, including work on motors." He is presently working on an Associates Degree, having acquired approximately fourteen college credit hours, and was contemplating a transfer to a college in Illinois. Defendant's only debt is \$600 owed to purchase his vehicle, but he testified that the friend who loaned him that money is not seeking to collect it at this time. Defendant pays approximately \$30 per month on two credit cards, which were obtained after the divorce. He presently has no house or car payment.

II. CONCLUSIONS OF LAW

Plaintiff contends that Defendant should not be allowed to discharge in this bankruptcy proceeding the debt that he was ordered to pay pursuant to the Divorce Decree, relying on 11 U.S.C. §§ 523(a)(5) and 523(a)(15).¹ Section 523(a)(5) exempts from discharge any debt “to a spouse, former spouse or child of the debtor for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record” 11 U.S.C. § 523(a)(5). Section 523(a)(15) provides that a discharge under § 727, 1141, 1228(a) or 1328(b) does not discharge an individual debtor from any debt –

[15] not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, a determination made in accordance with State or territorial law by a governmental unit unless–

(A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; or

(B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor.

11 U.S.C. § 523(a)(15).

For the reasons set forth below, the Court finds that § 523(a)(5) is inapplicable to this case, but that § 523(a)(15) is applicable, and Defendant shall not be allowed to discharge the debt he was ordered to pay pursuant to the Divorce Decree.

¹All statutory references are to the Bankruptcy Code, 11 U.S.C. § 101, et seq., unless otherwise specified.

A. Section 523(a)(5) is not applicable in this case.

Plaintiff contends that the debts Defendant was ordered to pay in the Divorce Decree are non-dischargeable pursuant to § 523(a)(5). As noted above, § 523(a)(5) provides an exception from discharge for debts that constitute “alimony to, maintenance for, or support of [a former] spouse or child.” Pursuant to § 523(a)(5), whether an obligation to a former spouse is support is a factual question that is resolved according to bankruptcy law, not state law. *In re Sampson*, 997 F.2d 717, 721 (10th Cir. 1993). The *Sampson* court used a two prong approach: 1) the court must divine the spouses' shared intent as to the nature of the payment; and 2) it must then determine that the substance of the payment was in the nature of support at the time of the divorce, i.e., whether the surrounding facts and circumstances, especially financial, lend support to such a finding. *Id.* at 725-26.

When the bankruptcy court reviews a divorce decree, “it must determine what was intended by the court in entering the decree and whether the evidence adduced in support of the decree justifies the court's characterization of the payments as alimony.” *Young v. Young (In re Young)*, 35 F.3d 499 (10th Cir. 1994). “The term ‘support’ is to be read broadly and in a realistic manner.” *Dewey v. Dewey (In re Dewey)*, 223 B.R. 559, 564 (10th Cir. B.A.P. 1998) (citing *Miller v. Gentry (In re Miller)*, 55 F.3d 1487, 1489-90 (10th Cir. 1995). Plaintiff bears the burden of proving that the debt is non-dischargeable under § 523(a)(5). *Grogan v. Garner*, 498 U.S. 279, 287 (1991).

The Divorce Decree provides that the debts at issue were part of the parties' property division. Based on the language contained in the Divorce Decree, it is clear that the parties intended the debts to be part of the property settlement of the divorce, and not support or maintenance. There has been no evidence presented to the Court that would tend to show that the debts at issue were actually for alimony,

maintenance or support of either Plaintiff or the parties' child. The Court finds that Plaintiff has failed to meet her burden of proving that the debt is non-dischargeable under § 523(a)(5).

B. The debt at issue is non-dischargeable pursuant to § 523(a)(15).

Plaintiff next argues that the debt is non-dischargeable pursuant to § 523(a)(15), which excepts from discharge debts incurred through a divorce proceeding other than those covered by § 523(a)(5), unless the debtor can show an inability to pay the debt or that discharging the debt will provide benefits to the debtor that outweigh any detrimental effects on the former spouse and/or children of the debtor. Judge Flannagan explained the burden of proof in § 523(a)(15) cases in *In re Hall*, 285 B.R. 485, 487-88 (Bankr. D. Kan. 2002) as follows:

The majority of courts addressing § 523(a)(15) have held that the non-debtor spouse must prove that the debtor incurred the debt in the course of a divorce or separation. Upon such showing, the burden shifts to the debtor who, to obtain discharge of the debt, must show either inability to pay the debt under § 523(a)(15)(A) or that the discharge would result in benefit to the debtor outweighing the detrimental consequences to the former spouse under § 523(a)(15)(B). "The courts have analyzed the terminology in [Section] 523(a)(15) as creating a 'rebuttable presumption' that the divorce obligation is nondischargeable unless the Debtor proves one of the exceptions set forth in subsection (A) or (B) of Section 523(a)(15)." *In re Custer*, 208 B.R. 675, 682 (Bankr. N.D. Ohio 1997).

Defendant does not contest the fact that the debt in this case was obtained in the course of a divorce or separation. Therefore, the debt will be found non-dischargeable under § 523(a)(15) unless he can prove that one of the exceptions found in § 523(a)(15)(A) or (B) is applicable.

1. Defendant failed to show that he lacks the ability to pay the debts in question pursuant to § 523(a)(15)(A).

Defendant can discharge the debts at issue upon showing that he does not have the ability to repay them. 11 U.S.C. § 523(a)(15)(A). The primary test for determining whether a debtor can repay the debts

is the Chapter 13 disposable income test. *In re Jodoin*, 209 B.R. 132, 142 (9th Cir. B.A.P.1997); *In re Johnson*, 212 B.R. 662, 667 (Bankr. D. Kan. 1997). The appropriate time for applying this test is at the time of trial. *Id.* The Court is not required to look only at the debtor's current financial status when determining whether he has the ability to repay the debt, but may also consider the debtor's prior employment history and potential future employment prospects. *See In re Molino*, 225 B.R. 904, 908 (6th Cir. B.A.P. 1998).

The evidence in this case shows Defendant has very few monthly expenses. He is living with his father and does not have any rent or house payment. He makes no car payment, although he does owe \$600 on his vehicle to a friend who is not currently seeking repayment. Defendant pays \$200 per month in child support and \$30 per month towards credit cards, which have now been canceled by him.

Defendant is currently unemployed, and his unemployment benefits expired shortly before the hearing in this matter. However, it appears his inability to find meaningful employment stems from his decision to live in Wichita, Kansas, coupled with the current economy of Wichita, rather than a lack of education, training or job skills. Defendant has a history of substantial employment and the education and training to continue to be gainfully employed in the future. Defendant had made the choice to live in a city which presently is enduring a struggling economy. That decision greatly contributed to Defendant's current lack of income. Defendant's conscious decision to place himself in this situation is not a basis for finding that he cannot repay the debts. Further, he had very recently moved to, and applied for work in, Illinois at the time of the hearing.

The Court finds Defendant has the ability to repay the debts in question. Defendant has very few living expenses and the potential for substantial future employment. Defendant's current lack of income is

based primarily on his decision to continue living in a community whose economy has made it difficult for him to find gainful employment. Based on Defendant's prior work experience, qualifications and education, however, he has the necessary earning potential to repay the debts he agreed to repay in his property settlement. This is especially true since nearly 100% of the wages Defendant would earn could be used to repay these debts, since he has such minimal living expenses. Therefore, Defendant is not entitled to a discharge of these debts pursuant to § 523(a)(15)(A).

2. Defendant has failed to show that discharging the debt will provide benefits to him that outweigh any detrimental effects on his former spouse and/or child.

Defendant can obtain a discharge of the instant debts by showing that discharging the debt will provide him benefits that outweigh any detrimental effects on his former spouse. Because the non-debtor spouse has access to the evidence of his or her current financial condition, the non-debtor spouse has the burden of production with regard to the detrimental effect he or she would suffer if the debt were discharged. *See In re Johnson*, 212 B.R. at 666. "The ultimate burden, however, lies with the debtor because § 523(a)(15)(B) like subsection (A), is an affirmative defense." *Id.* (citing *In re Hill*, 184 B.R. 750, 754 (Bankr. N.D. Ill.1995)).

As noted above, Plaintiff, like Defendant, is unemployed. Plaintiff's sole source of income includes \$200 per month in child support from Defendant and \$980 per month from Social Security for another child. However, the \$980 per month will likely end in the near future when her fourteen-year-old daughter's eligibility for benefits expires. Unlike Defendant, Plaintiff has extensive monthly expenses, including the sole care of three children, mortgage payments on her land, and payments on her mobile home. Plaintiff is substantially less "employable." Plaintiff is also raising Defendant's young daughter, along

with two other children. The cost of child care, if Plaintiff were to find full-time employment, would consume a significant portion of any wages she could likely earn, given her limited job skills and education.

Based upon the relative financial status of the parties, their respective prospects for future gainful employment, and their current and future living expenses, the Court finds that Defendant has failed to prove that discharging the debts will provide him benefits that outweigh any detrimental effects on his former spouse, and his four year old child, as required for a discharge under § 523(a)(15)(B). In fact, the Court finds that Plaintiff has clearly established that discharging the debts will have much greater detrimental effect on her and her children, including Defendant's child, than it will provide a benefit to Defendant, even though the burden of proof was not hers on this issue. Therefore, the Court finds that the debts are not dischargeable under § 523(a)(15)(B).

III. CONCLUSION

The Court finds that the debts awarded to Defendant in the Divorce Decree are non-dischargeable. Although these debts are clearly not owed "to a spouse, former spouse or child of the debtor for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record," as set forth in § 523(a)(5), the Court finds they are nevertheless non-dischargeable pursuant to § 523(a)(15). Plaintiff has met her burden of proving that these were debts incurred through a divorce proceeding other than those covered by § 523(a)(5). In addition, Defendant has failed to show that he lacks the ability to pay these debts or that discharging the debt will provide him benefits that outweigh any detrimental effects on his former spouse and child.

IT IS, THEREFORE, BY THIS COURT ORDERED that judgment shall be entered in favor of Plaintiff on the Petition to Determine Dischargeability of Debt (Doc. 1). The debts awarded to Defendant in the parties' Divorce Decree are non-dischargeable pursuant to 11 U.S.C. § 523(a)(15).

IT IS FURTHER ORDERED that the foregoing constitutes Findings of Fact and Conclusions of Law under Rule 7052 of the Federal Rules of Bankruptcy Procedure and Rule 52(a) of the Federal Rules of Civil Procedure. A judgment based on this ruling will be entered on a separate document as required by Fed. R. Bankr. P. 9021 and Fed. R. Civ. P. 58.

IT IS SO ORDERED this 17th day of September, 2003.

JANICE MILLER KARLIN, BANKRUPTCY JUDGE
UNITED STATES BANKRUPTCY COURT
DISTRICT OF KANSAS

CERTIFICATE OF MAILING

The undersigned certified that copies of the **Memorandum and Order** was deposited in the United States mail, prepaid on this 17th day of September, 2003, to the following:

Robb W. Rumsey
1041 N. Waco
Wichita, Kansas 67203

Michael J. Studtmann
John M. Studtmann
2400 W. Pawnee, Suite 110
Wichita, Kansas 67213

Debra C. Goodrich
Judicial Assistant to:

The Honorable Janice Miller Karlin
Bankruptcy Judge